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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WELLS FARGO BANK N.A., Plaintiff and Respondent, v. GERRY BURK, Defendant and Appellant.	B212302 (Los Angeles County Super. Ct. No. BC337092)

APPEAL from an order of the Superior Court of Los Angeles County. Robert Hess, Judge. Affirmed.

Gerry Burk, in pro per, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Gerry Burk appeals from an order denying his: (1) motion to dismiss the respondent Wells Fargo Bank N.A.'s action for delay of service of summons; (2) motion to set aside default and vacate default judgment; and (3) a request for an order "removing all recordation of judgment." Appellant, however, waited more than three years after he had actual notice of the action and more than two and one-half years after the default judgment was entered against him to seek relief from the judgment. Whether or not respondent effected proper service of the complaint and summons under the Code of Civil Procedure, appellant's attempt to challenge service and set-aside the judgment was untimely and thus the trial court properly denied the requested relief. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 25, 2005, respondent filed a complaint against appellant in the superior court. Respondent hired a process server to serve appellant. In late July 2005, process server made three attempts to personally serve appellant at the address of a private mailbox on Robertson Blvd. in Los Angeles. Appellant had previously applied for a loan from respondent and on the application had listed the Roberston Blvd. as his home address. Thereafter on July 30, 2005, the server left a copy of the summons and complaint with the clerk at the private mailbox, and also served the documents on the Robertson Blvd. address by first class mail. Appellant concedes that in August 2005 he received the copy of the complaint and summons which was served by mail at the Robertson Blvd address.

The proof of service and server's declaration of diligence was filed in the superior court on August 4, 2005. Appellant did not respond to the complaint, did not file a motion to quash, or otherwise appear to challenge the service. At respondent's request, default was entered on September 20, 2005, and judgment in favor of respondent in the amount of $57,303.23 on the default was subsequently entered on November 16, 2005. Both the request for default and the subsequent judgment were served on appellant at the

Robertson Blvd. address. Respondent served the notice of entry of judgment on appellant on January 6, 2006.

On August 18, 2008, appellant, acting in pro per, filed in the superior court: (1) a motion to dismiss action for delay of service of summons per Code of Civil Procedure section[1] 583.210; (2) a motion to set aside default and vacate default judgment; and (3) a request for an order removing all recordation of judgment. Appellant argued that the judgment should be set aside and the action dismissed because respondent's service of the summons and complaint was legally defective and because respondent failed to properly serve appellant within three years of filing the complaint. The court denied the motions and request, finding: (1) that proper substitute service had been effected at the Robertson Blvd. address; (2) appellant admitted that he had been actually served; and (3) appellant had provided Robertson Blvd. as his address on the correspondence with the court. The court further noted that judgment had already been entered in the case and observed that appellant "chose not to respond based on his conception of service requirements and is now stuck with his decision."

This timely appeal followed.

DISCUSSION

Before this court appellant asserts the lower court erred in refusing to vacate the judgment, set-aside the default and dismiss respondent's action. He claims that respondent's efforts to serve him with the summons and complaint were legally ineffective and thus the action should be dismissed because proper service was not effected within three years after the respondent filed the complaint. We need not assess the merits of these contentions or court's stated rationale in denying relief. (See *Bains III v. Moores* (2009) 172 Cal.App.4th 445, 478 [appellate court reviews the trial court's

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1 All statutory references are to the Code of Civil Procedure unless otherwise indicated.

result for error not its legal reasoning].) As we shall explain, even were we to assume that appellant's complaints about the service and summons were correct we would affirm the lower court's decision. The result the court reached was correct because appellant's challenge to service of the summons and complaint and to the judgment was untimely.

Various procedures exist to challenge a summons that has been improperly issued or served, or in which the proof of service is defective. Our discussion focuses on those that might have applied in this case—where a self-represented party obtains actual notice of the action shortly after it was filed.

The first means to attack improper summons or service is a motion to quash service of summons. (See § 418.10.) A motion to quash must be made as the defendant's initial appearance in the action, and must be filed on or before the last day to either file an answer or a demurrer. Thus, in general the motion must be filed within 30 days after the purported service. (See § 418.10, subd. (a) ["A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her"].)

A second method to challenge service of the summons and complaint is a motion to dismiss for delay in the service of summons. (See *Mannesmann Demag, Ltd. v. Superior Court* (1985) 172 Cal.App.3d 1118, 1124-1125.) A motion under section 583.210, is appropriate where the plaintiff has failed to properly serve the summons and complaint within three-years of filing the complaint in the superior court. (*Ibid*.; § 583.210.) In general, a motion to quash rather than a motion to dismiss pursuant to the three-year statute is the procedural device used to test the validity of improper service. However, as the court in *Mannesmann* stated: "[t]he requirement of section 583.210, that 'summons and complaint shall be served upon a defendant within three years after the action is commenced . . . ,' necessarily raises the issue of the validity of the service."

(Citation omitted.) (*Mannesmann Demag, Ltd. v. Superior Court*, *supra*, 172 Cal.App.3d at p. 1125.)[2]

If the defendant does not raise the defect in service of the summons and complaint prior to the entry of default, then the defendant may still challenge the validity of the service through a motion to set-aside the default judgment pursuant to section 473.5, subdivision (a). However to rely on section 473.5, subdivision (a) the defendant must demonstrate that the defectively-served summons deprived him or her of actual notice of the proceedings in time to raise the defect before the default was taken. This method of challenging service of summons requires a motion to be made within a "reasonable time," and in no event later than 2 years after the entry of the default judgment, or 180 days after notice of entry of the default, whichever is earlier. (§ 473.5, subd. (a); see *Gibble v. Car–Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 300.) Alternatively, the defendant can seek relief from default and to vacate the default judgment under section 473, subdivision (d). "Under section 473, subdivision (d). . . the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service." (*Ellard v. Conway* (2001*)* 94 Cal.App.4th 540, 544.) A motion under section 473, subdivision (d) might be appropriate where the defendant has actual notice of the proceedings, and yet has failed to challenge service prior to the entry of the judgment. However, a motion for relief under section 473, subdivision (d) must be made within the statutory period set forth under section 473.5,, subdivision (a) (i.e., within a reasonable time not to exceed the earlier of two years after entry of a default judgment or 180 days after service of a notice of entry of that judgment). (See 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814-815.)

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2 The court further observed that where "the attempted service is made very close to the running of the three-year period, a granted motion to quash would have afforded no opportunity to the plaintiff to have attempted to correct the defective service. Accordingly, not employing a motion to quash did not prejudice real party. . . . To hold otherwise would be to exalt a procedural technicality over substance." (*Mannesmann Demag, Ltd. v. Superior Court*, *supra*, 172 Cal.App.3d at p. 1125.)

As another means to attack service, the defendant may avoid any appearance in the trial court and directly appeal from the default judgment on ground of improper service of summons. However, to challenge service of summons by this method, the appeal must be timely under the rules of court. Thus, the defendant must appeal from the default judgment no later than 180 days after entry of the judgment, or 60 days after service of the notice of the judgment under rule 8.104(a) of the Rules of Court.

Finally, if all other time periods have expired, the defendant may be able to raise the improper service of summons by collateral attack: i.e., a separate suit in equity to have the judgment set aside for lack of jurisdiction; or defendant may wait until the judgment is sought to be enforced and then raise the lack of jurisdiction as a defense to its enforcement. (See *Donel, Inc. v. Badalian* (1978) 87 Cal.App.3d 327, 333–334.)

Appellant did not pursue several options to challenge the service of the summons and complaint described above, and of those that he used, he sought them too late. Appellant did not file a motion to quash. His motion to dismiss for delay in the service of summons is inapt because it was filed *after* the judgment had been entered in the action. After judgment has been entered the recourse to challenge service changes—at that point the moving party must seek to set-aside the judgment. However, here, appellant's motion to set-aside the default and vacate the judgment was untimely as it was filed in August 2008 almost 3 years after the judgment was entered in November 2005. Furthermore, appellant cannot directly appeal from the judgment; any such appeal would be dismissed as untimely under Rules of Court, rule 8.104. Finally, appellant has not sought to challenge the service by way of a separate suit in equity.

In short, based on what is before this court, appellant has not demonstrated reversible error in the lower court's refusal to grant his requested relief. Appellant was admittedly aware of the action shortly after it was filed. He had ample procedural opportunities to bring the alleged defective service to the attention of respondent and the lower court. For whatever reason, however, appellant chose to do nothing for three years. Having made that choice, he must now live with the consequences. When relief is legally available and procedurally possible, there is a strong public policy in favor of granting it

and allowing the requesting party his or her day in court. Beyond this period, however, there is a strong public policy in favor of the finality of judgments. Here, respondent is entitled to finality.

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.